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Rebekah Henderson  
Commerce Commission  
WELLINGTON  
By email: Rebekah.Henderson@comcom.govt.nz

Dear Rebekah,

**Re: Draft Report on regulation of Resale Services**

This letter is Vodafone's response to the Commerce Commission's Draft Report (the Report) on whether the Resale Services should be omitted from Schedule 1 of the Telecommunications Act 2001 (the Act), or amended in some form.

As stated in our previous submission, generally Vodafone supports a narrowing of the resale services regulation where the risk of service degradation, whether from a quality perspective or a price perspective, is insignificant for end users of telecommunication services.

In many cases, proposed deregulation presents little risk to existing services and so regulation can quite rightly be rolled back. However we do have some concerns with the Commission's proposals. In summary, Vodafone's position is as follows:

1. Resale services that are no longer relevant to the market or the Access seekers can be omitted from Schedule 1;
2. Resale services for which a suitable migration path to better alternatives has been agreed could be omitted;
3. Resale services, and more specifically bundles and retail services as part of a bundles, will remain important to access seekers for as long as the PSTN infrastructure will be predominant and should not be omitted;
4. The Commission could omit these services if Telecom is prepared to make commitments to ongoing availability of these services on terms no worse than the current wholesale terms. In this regard, it is unfortunate that a binding undertaking was not submitted earlier on in this resale regulatory process.

These points are explained further below. We also propose a minor change to the description of service of the proposed new regulated service, and make some comments on other analytical issues we see in the Commission's report.

### **Need for a commitment from Telecom**

As the Commission correctly stated in the Report, today all resale services are provided according to commercial terms. We acknowledge that since we started the provision of those services to our customers, our contractual terms with Telecom have been reasonable.

Without the backstop regulation of resale services, there is a risk that Telecom will not continue to provide reasonable commercial terms. If any resale services are to be omitted from the Act, we believe that the Commission should monitor Telecom's behaviour in the market for resale services to ensure that they are not acting in an anti-competitive manner.

In accordance with the current processes, Telecom has to give access seekers 30 days' notice to change terms or discontinue a service. Such a notice has rarely been received in the last few years. It would be very easy to assume that the regulatory backstop played an important role in this behaviour.

We would expect Telecom to have strong incentives to negotiate reasonable commercial terms in a market with increasing competition in order to maintain its wholesale revenue. However, based on our past and also more recent experience in engaging in commercial negotiations with Telecom, those incentives may be insufficient. It has proven to be more and more difficult to get an appropriate level of engagement from Telecom and get some traction from Telecom's representatives on the key subjects that Vodafone wants to address. The need to constantly chase up Telecom and an apparent lack of willingness to understand and accept access seeker priorities have delayed our discussions with Telecom significantly.

It is difficult for Vodafone to assess the likelihood of Telecom's behaviour changing based on the removal of the regulatory backstop. However, we can estimate the costs and potential risks for Vodafone as a business as well as for our customers if the current commercial terms were to be renegotiated. We will expand on this later in this submission.

Today, there has not been a commitment in any form from Telecom to provide equivalent terms for Resale Services once the Commission issues its final decision. In an environment where the regulatory backstop is removed, we do not think that it is appropriate for access seekers to bear the risk of significant changes to the commercial terms.

Vodafone does not believe that it is possible for access seekers, or the Commission, to assess and foresee Telecom's future behaviour. However, by requesting that Telecom commit to the provision of reasonable commercial terms for Resale Services, any potential risks due to the omission of some Resale Services could be minimised.

### **Omission of bundles of retail services**

Vodafone is concerned by the Commission's decision to omit "bundle of retail services offered by means of Telecom's fixed telecommunications network" as well as "retail services offered by means of Telecom's fixed telecommunications network as part of a bundle of retail services" from Part 2 of Schedule 1 of the Act.

The Commission's assumption that access seekers will be able to provide bundles to their customers in a resale market where only single retail services would be provided to them is correct. The technical impact of the omission and, eventually, disappearance of the bundles from the commercial terms would be minimal for both access seekers and end users.

However, the impact on the price could be significant.

Vodafone is currently consuming bundles of retail services from Telecom at a wholesale level on commercial terms and we benefit from the differential discounted price. According to our calculations, if we were to be provided with the same retail services bundled at the retail level with a wholesale price as set up today for each single retail service, we would miss out on around \$24,000 of savings every month.

In some instances, the difference between the current bundle wholesale price and the potential price combining the price for each single retail price is more than \$7 a month. Even worse, for some of those bundles, we would have to incur a loss if we want to maintain competitive retail prices while offering the services. Removing the bundled retail services from the Act will remove Telecom's incentive to provide bundled services at a wholesale price that enables access seekers to compete with it.

Although the volumes of these services are relatively modest, it is not obvious to us that the Commission should roll back resale regulation if the result would be disadvantageous financial arrangements for access seekers. The Commission's decision should not be to the detriment of end users' choices for their fixed line services or of service providers' ability to compete.

Vodafone recommends that the Commission reconsider its decision to withdraw the regulation of resale bundles.

### **Migration path and planning required**

Vodafone supports the suggested new designated access service description for non price-capped local access and calling services. A narrower regulatory scope can create efficiencies for the parties to Resale Services as well as for the Commission.

However, in line with TelstraClear's submission on Telecom's proposal, if the backstop of regulation is removed, access seekers will have less control on the migration of some services that will fall to Telecom to determine. As the UBS to UBA migration has not proven to be a smooth exercise for access seekers, Vodafone suggests that the Commission requires Telecom

to specifically address migration in its proposal for the future commercial terms for Resale Services.

### **Uncertainty of the telecommunications regulatory environment**

In the Report, the Commission states that Telecom's operational separation undertakings (Undertakings) are relevant and have been taken into account in its investigation (para 75 and 76 of the Report). Since the Undertakings have been approved, Telecom has requested four variations. So far, all requests for variation have been accepted by the Minister. Vodafone's position and comments on the validity and impacts of the variation requests are stated clearly in our submissions on those variations.

The Ultra Fast Broadband initiative (UFB) has been used by Telecom to negotiate changes to their regulatory obligations or pauses in some programs of work. All telecommunications industry players face the challenges of UFB and new technologies and they aim to accommodate future changes in their long term forecasts.

Specifically on Resale Services, in an environment where the regulatory backstop would be narrowed or removed, access seekers will rely more heavily on operational separation and Telecom's obligations under the Undertakings. Given the ongoing changes, we are not as confident as previously that Telecom will not negotiate changes to these obligations.

Vodafone recommends that the Commission considers this uncertainty about protections for access seekers in the future in its decision.

### **Other comments on Commission's approach**

We also wish to comment on a few more analytical points raised for us by the Commission's draft report.

#### *Market definition*

In paragraph 270 of the Report, the Commission mentions that in the UBS determinations it found DSL, cable, satellite, fibre and fixed wireless access to be in the same product market for broadband access. But, it excluded 3G mobile due to "relatively higher pricing" and "relatively low speeds compared to fixed broadband". In the Report the Commission changes its position and states that satellite and fixed wireless should be removed for the same reasons 3G was excluded in the UBS determinations.

In our view mobile and fixed services are increasingly competitive with each other, and increasingly treated as substitutes by customers. I note, for example, that Vodafone sells 2GB of mobile broadband for just under \$50 a month on a 12 month term. The same volume of data on fixed line services costs \$70 a month, but includes free local calling. Customers who

do not make a lot of local calls may well find that mobile broadband is better value than fixed broadband already.

We also do not find the case for excluding satellite and fixed wireless particularly compelling. There does not appear to be any evidence presented that the prices and performance in fixed broadband have fallen faster than for satellite or fixed wireless over time to provide some logic to change the approach compared to when the UBS determinations were completed.

#### *Geographic market definition*

It seems reasonable to us to apply a general competition test instead of trying to apply specific geographic exemptions in defining where Telecom faces effective competition. The latter approach seems likely to create extra costs that could easily be avoided without adding any real value. If Telecom started to significantly differentiate local access or data pricing within metro areas, a more finely-grained approach to geographical market definition might make sense.

#### *Qualitative vs quantitative cost benefit analysis*

Vodafone would like to invite the Commission to reconsider its approach to cost benefit analysis. We believe that there are significant merits in undertaking quantitative analysis of costs and benefits. The Commission's approach to cost benefit analysis set out in paragraphs 66 to 71 of the Report is unconvincing. The Commission has excused itself from applying some rigour to its analysis with an argument that it is too hard to quantify the benefits of removing these services from designation in Schedule 1.

While we realise that gathering the numbers might require some additional work, in our experience, quantifying analysis tests judgements much more effectively than relying on qualitative analysis. Qualitative analysis provides wide discretion and involves less testing of what factors might really benefit end users. For example, qualitative analysis suggests that the impact for end users would be close to nil of omitting the regulation of bundles from the Act. A quantitative approach shows there could be impacts on access seekers ability to compete from this omission.

#### *Local access services*

Vodafone has argued that resold local access lines may be the only means of providing voice services to customers where the access seeker does not have its own infrastructure. UCLL is not a short term alternative for most of these customers and may never be an alternative for many. Regulation of resale local access must continue for as long as the legacy PSTN remains in service. That said, over time we would expect the differential between mobile services and fixed services to erode, and that may enable further deregulation. Vodafone has recently, for example, launched a naked DSL product that gives customers a discount for buying both fixed broadband and on account mobile.

*Service definition*

We think a change to the definition of the “Non price-capped local access and calling service offered by means of Telecom’s fixed telecommunications network” is required to insert the word business. It should read as follows:

“A non price-capped business local access and calling service offered by Telecom to end-users by means of its fixed telecommunications network, in the following markets:

(a) all markets in which Telecom faces limited, or is likely to face lessened, competition for the service:

(b) all, some, or no markets in which Telecom does not face limited, or is not likely to face lessened, competition for non price-capped business local access and calling service as determined by the Commission

Please feel free to contact me in relation to this submission if any clarification would be helpful.

Yours sincerely,

Celine Gilbert  
Industry Affairs Manager  
Vodafone New Zealand Limited